TMK v Republic [2020] eKLR

TMK v Republic [2020] eKLR

Neutral citation: [2020] KEHC 9063 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL 17 OF 2019

JM MATIVO, J

JANUARY 23, 2020

BETWEEN

TMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against Judgement, conviction and sentence passed in Kilifi PMC Criminal Case Number 217 of 2015, R. vs TMK, delivered by L.N. Juma on 3.5.2019)

JUDGMENT

1. On 3rd March 2019 the appellant, TMK was convicted and sentenced to fifteen years imprisonment in Kilifi PMCR case number 217 of 2015 for the offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act*[1] (herein after referred to as the act).There was no finding on the alternative count on committing an indecent act with a child contrary to section 11(1) of the act. It was alleged that in December 2014 at [particulars withheld] Township within Kilifi County intentionally and unlawfully caused his penis to penetrate the virgin of JNK, a child aged 15 years.

2. Alternatively, he was accused of committing an indecent act with a child contrary to section 11 (1) of the Act. It was alleged in that in 2014 at [particulars withheld]Township within Kilifi County he intentionally and unlawfully touched the virgin of JNK, a child aged 15 years.

Approach to appeal

3. As a first appellate court, this court's duty[2]is to subject "the evidence adduced in the lower court as a whole to a fresh and exhaustive examination[3] and to the render this court's own decision on

1 *Act No 3 of 2006*.

2 Okeno vs. R {1972) E.A, 32at page 36.

the evidence." Simply put, this court is required to weigh conflicting evidence and draw its own conclusions,[4] only then can it decide whether the Magistrate's findings should be supported. In doing so, this court should make allowance for the fact that the trial court had the advantage of hearing and seeing the witnesses.[5]

The trial at the lower court

4. Upon conducting voir dire examination, the trial Magistrate was satisfied that the complainant JNK understood the nature of oath and he allowed her to testify under oath. Her evidence was that the appellant is a relative from her grandfather's side. She said that in December 2014, she found the appellant drinking alcohol with his friends, but after passing them, the appellant told her to wait for him. She said she was not scared because she knew him. She said first he said he wanted to send her to another girl, he changed and told her that what he wanted from the other girl he could get from her. She said he told her he would give her anything, but she refused, but, he held her hand and pushed her to the forest. She said he told her not to scream, then he removed her clothes and raped her and told her not to report at home otherwise he would do something to her which she would never forget. She said she got scared and never told her grandmother with whom she was staying with because her mother was staying at her place of work. She said she decided to tell her mother in April, and, her mother reported to the police. She said she went to Kilifi District Hospital and her P3 form was completed which she identified in court. She said upon examination, the Doctor said she had a STD. She also identified her PRC form. Upon cross examination, she stated that she did not report because her mother works away and she stays with her grandmother. She said she met the appellant at 6pm and left the place between 7 to 8pm. She maintained that it is the appellant who defiled her.

5. JCK, testified the appellant came to his palm wine premises and asked him "if you have sex with a child belonging to your sister can it bring a curse." He said he later learnt that the child was the complainant, then he reported to the village elder. He said that the appellant is an uncle to the appellant.

6. KCJ, the complainant's mother testified that she normally leaves her children with her mother and brothers because she works away from home. She recalled that in April 2015, she was called by the complainant, but it was raining and she could not hear well. She said that on the third day the appellant called her and told her something had happened and he wanted them to discuss. She said that after four days she went home, and the appellant said they will speak later. She said later while she was with her sister in law, the appellant bowed down and told her he had something to tell her, and when she went to the house, she was informed that the appellant had defiled the complainant. She said that the complainant told her that the appellant defiled her. She said the appellant is an uncle to the complainant.

7. Dr. Noorein Abdul Wahib produced the P3 form prepared by Dr. Hashim with whom he had worked with and was familiar with her handwriting. He said the complaint's estimated age was 15 years, and that, her hymen was open and rugged. The estimated age of the injury was one day. He also produced the PRC form.

8. CPL Philip Dzombo from Kilifi Police Station testified that he was the investigating officer, and that, he received the complaint. He also said he obtained the birth certificate from the complainant.

[3] See Pandya vs Republic {1957}EA 336.

[4] See Shantilal M. Ruwala vs Republic {1957} EA 570.

[5] See Peter vs Sunday Post {1958} EA 424.

9. At the close of the prosecution case, the trial Magistrate ruled that a prima facie case had been established and put the appellant on his defence. He complied with the provisions of Section 211 of the Criminal Procedure Code[6] and the appellant opted to give sworn evidence.

10. In his sworn evidence, the appellant stated that on the material day he was in Mombasa on work related issues and that in December 2014 he was not at home. He stated that he had a dispute with PW2 who is his cousin, and, that, he never used to go to his palm place. He stated that they wanted to sell them land forcefully. He denied going to Js place as he alleged or having sex with the complainant. He also said he has had a bad blood with a one S, a brother to PW2. He also said the complainant was staying with her grandmother who was not called as a witness and that the charges were false. He said this case was brought because of a land dispute, and, that they sold his portion, hence the reason they have as grudge with him.

The verdict

11. In her judgement, the learned Magistrate analysed the prosecution evidence and the defence. She was satisfied that the appellant was properly identified, that penetration was proved, and that the complainant's age was proved by the birth certificate to be 17 years. She convicted the appellant and sentenced him to 15 years jail.

The appeal

12. The appellant seeks to overturn the decision on the following grounds:-

    a. That the learned trial Magistrate erred in law in convicting him on a defective charge sheet.

    b. That the learned trial Magistrate erred in failing to appreciate the existence of a grudge.

    c. That the learned trial Magistrate erred in law in allowing the close of the prosecution case without calling essential witnesses (the nurse named Sidi) contrary to sections 150 and 125 of the *Evidence Act*.

    d. That the trial court erred both in law and facts in not considering that the doctors report was not conclusive.

    e. That the trial court erred both in law and in facts when she failed to see the prosecution evidence was full of contradictions, inconsistences and fabrications.

    f. That the trial erred in law by disregarding and wrongfully rejecting his defence though it was credible.

Issues for determination

13. I find that the following issues distil themselves for determination, namely:-

    a. Whether the charge sheet was defective.

    b. Whether the offence of defilement was proved to the required standard.

    c. Whether the prosecution failed to call key witnesses.

    d. Whether the appellant's defence was considered.

[6] Cap 75, Laws of Kenya.

Whether the charge sheet was defective

14. The appellant argued that whereas the main count stated that the complainant was 15 years, the alternative count gave her age as 16 years. He argued that the said ages attract different sentences under the law, and, that, the court did not amend the charge sheet as the law permits. He noted that the learned Magistrate pointed out the age of 15 years stated in the charge sheet was a curable error under section 382 of the Criminal Procedure Code.[7]He relied on Wanjiku v Republic[8]where the court found a charge sheet to be defective for failing to specify an activity or act.

15. The Respondent's counsel did not address this ground of appeal.

16. My understanding of the appellant's contention is that in count one age was shown as 15 years but in the alternative count it was shown as 16 years, hence, this renders the charge sheet incurably fatal.

17. True, the law contemplates that there may be occasions when there will be an error, omission or irregularity in a charge. Moreover, there will be errors, omissions or irregularities that will defeat a charge. However, whether such an error, omission or irregularity is incurable will depend on whether it occasions a failure of justice. This is the foundation of Section 382 of the Criminal Procedure Code[9]which the learned Magistrate correctly invoked. It provides:-

> 382. Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

18. Discussing the above proviso, Rudd J[10]stated:-"as regards the proviso to this section, no objection to the charge has been raised at all to this very moment by the appellant. On the other hand if the appellant in the said case had objected to the charge at any proper time in the lower court the charge could have been amended...." I have searched the entire record and I find that no objection to the charge sheet was raised through-out the proceedings. The appellant was represented by an advocate in the lower court. In any event, even if an objection had been raised, the error is of such a nature that it could have been cured by an amendment.

19. Also relevant is section 134 of the Criminal Procedure Code[11]which provides that:-

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with

7 Cap 75, Laws of Kenya.

8 {2002} KLR.

9 Ibid.

10 In the case of Mwasya vs Republic {1969} EA 280.

11 Cap 75, Laws of Kenya.

such particulars as may be necessary for giving information as to the nature of the offence charged."

20. The above provisions lead me to the conclusion that the charge sheet as drawn was not incurably defective or prejudicial to the appellant. In fact from the particulars, it discloses the offence of defilement under section 8 (1) (3) of the Act.

21. Guidance can be obtained from Seidi v Republic[12] where the state counsel conceded in court that the charge sheet as framed was defective. The court held that the defects in the charge sheet had occasioned no failure of justice and were curable. A similar position was held in the case of Mwasya v Republic[13] where the court held that the charge was defective, but not of such an irregularity or error to occasion a failure of justice under Section 382 Criminal Procedure Code.[14]In Avone v Uganda, the court held that where the mis-descriptions in the charge sheet had not prejudiced the appellant, the convictions ought to be allowed to stand.

22. I am fully alive to the fact that it is an established position that where a charge sheet does not allege an essential ingredient of the offence,[15] then it is defective. In Sigilani v Republic,[16] it was held that the principle of the law governing charge sheets is that an accused person should be charged with an offence known in law. The offence should be disclosed and stated in a clear and unambiguous manner so that the accused may be able to plead to specific charge that he can understand. It will also enable the accused to prepare his defence.

23. My reading of the particulars in the charge sheet and the evidence tendered leaves me with no doubt that from the onset; the appellant knew the charges facing him.[17] In fact, during his defence he stated that he understood the charges and proceeded to tender his defence. The particulars were carefully spelt out. In any event, the appellant has not demonstrated that he suffered any prejudice because of the charge sheet as drawn. He fully participated in the trial.[18]

24. Perhaps I should add that the charge sheet outlines the essential ingredients and particulars of the offence, the evidence adduced was geared to establishing the said offence and the defence offered was clearly a direct response of the allegations made against the appellant. Thus, the appellant fully understood the nature of the offence and the evidence against him. Where no prejudice is alleged to have been suffered or demonstrated, or unless the charge sheet is out rightly defective or ambiguous the court will be reluctant to pronounce the same as defective.

25. Our courts have consistently upheld the same position. In Republic v Mohamed Abdi Bille,[19] the court held that the appellant was not prejudiced nor was there "a miscarriage of justice or prejudice due to

12 Supra.

13 {1967} EA 345.

14 Cap 75, Laws of Kenya.

15 See Yosefu and Another vs Uganda {1960} EA 236.

16 {2004}2KLR 480

17 Brian Kipkemoi Koech v Republic [2013] eKLR

18 See Fappyton Mutuku Ngui vs Republic CA Cr app no. 32 of 2013-Kiahar Kariuki, Maraga & J. Mohammed.

19 [2014] eKLR.

the manner the charge was drafted..." In Vincent Shatuma Naste v Republic[20]the court declined to find that the charge sheet was defective where no prejudice on the accused person was proved.

26. Section 134 of the Criminal Procedure Code[21] requires that every charge or information shall contain, and shall be sufficient, if it contains a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence. In my view, the charge sheet complies with this section. It contained such particulars as may be necessary to give the appellant reasonable information as to the nature of the offence.

27. Section 137(a) of the Criminal Procedure Code[22] requires that the Statement of an offence should offer a brief description in ordinary language, avoiding as far as possible the use of technical terms and that it is not necessary to put all the elements of the offence within the Statement. I find that the charge sheet conforms to this section.

28. Section 137(a)(i) and (ii) of the Criminal Procedure Code[23]provides that if the offence charged is one created by a statutory enactment, it must contain a reference to the Section of the enactment creating the offence. In this regard, Section 8 (1) (3) which creates the offence and the punishment was cited. The particulars provided the details of the offence. The age was proved by evidence. I decline to uphold the objection that the charge sheet was defective.

Whether the offence of defilement was proved to the required standard

29. The appellant argued that the incident occurred in December 2014, while the P3 form indicated the injury was one day old. He argued that the failure to call the doctor who completed the P3 Form left doubt on the reliability of the Medical Report.

30. The Respondent's counsel's submission was that penetration was proved. He referred to the treatment notes and the doctor's evidence and argued that a sexual offence can be proved by oral evidence and circumstantial evidence. For this proposition he relied on AML v Republic.[24] Counsel also relied on Kassim Ali v Republic[25] for the holding that the absence of medical examination to support the fact of rape is not decisive because the fact of rape can be proved by oral evidence of a victim of rape or by circumstantial evidence.

31. The Respondent's counsel also argued that the appellant is a relative to the complainant, hence he was known to her. As a result, h argued that identification was proved. In addition, counsel submitted that age was proved by way of the Birth Certificate.

32. Section 8(1) of the Act provides that "a person who commits an act which causes penetration with a child is guilty of an offence termed defilement." The section provides the key elements of the offence of defilement. These are "Penetration," and "Child." The act defines "penetration" as partial or complete insertion of the genital organs of a person into the genital organs of another person.

20 [2014] eKLR.

21 Ibid.

22 [22] Ibid.

23 [23] Ibid.

24 {2012} e KLR.

25 Criminal Appeal No. 84 of 2005.

33. The other element is that the person must be a child. The act defines a child as "child" has the meaning assigned thereto in the Children's Act.[26] The Children's Act defines a "child" as any human being under the age of eighteen years. The complainant's Birth Certificate was produced in court. It shows that the complaint was aged 17 years at the time of the offence. I find that age was proved as required.

34. On penetration, the complainant narrated how the appellant led her to the forest and defiled her. She explained that her mother was staying at her place of work, hence, she could not report to her. On record is her mother's testimony explaining how the appellant tried to reach her to discuss the issue. Also relevant is the evidence of PW2 who quoted the appellant asking whether a curse could befall a person in the event of having sex with a sister's child. He later on learnt that the complainant was the child the appellant was talking about. In addition, the Medical evidence which established that the complainant's hymen was open and rugged. The prosecution evidence is to be considered together with the defecnce. The said evidence weighed against the appellant's defence leaves me with no doubt that the appellant did not rebut the allegations against him.

35. I find no basis to fault the learned Magistrates finding that the ingredients of the offence had been established. The learned Magistrate had the benefit of seeing the witnesses testify first hand and was in a better position to weigh the credibility of their evidence and to consider how much weight to attach to the evidence.

Whether the prosecution failed to call key witnesses

36. The appellant argued that the failure by the prosecution to call the medical doctor who examined the complainant weakened the prosecution case. He relied on Bukenya & Another v Uganda[27] for the holding that the prosecution is duty bound to make available all the necessary witnesses to establish the truth, even if their evidence may be inconsistent to its case, otherwise, failure to do so may in appropriate cases lead to an inference that, the evidence of uncalled witnesses would tend to be adverse to the prosecution case.

37. The Respondent's counsel did not address this issue.

38. The appellant's argument brings into memory the provisions of section 143 of the *Evidence Act*[28] which provides as follows:-

> "No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact."

39. Addressing the question of alleged failure by the prosecution to call witnesses in a criminal trial, the Court of Appeal in Julius Kalewa Mutunga v Republic[29] expressed itself as follows:-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

26 Cap 141, Laws of Kenya.

27 {1972} EA 549.

28 Cap 80, Laws of Kenya.

29 Criminal Appeal No. 31 of 2005

40. A similar position was repeated by the Court of Appeal in Alex Lichodo v Republic.[30] Perhaps the leading authority on this issue is the case of Bukenya & Others v Uganda[31] where the East African Court of Appeal held that:-

    i. the prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    ii. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    iii. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

41. In the above case, the court was categorical that the prosecution is not expected to call a superfluity of witnesses. The adverse inference will only be made by the court if the evidence by the prosecution is not or is barely adequate. Accordingly, it will not be inferred where evidence tendered is sufficient to prove the particular matter in issue or the entire case.

42. Perhaps, I should emphasize that the rule in Jones v Dunkel[32] which outlines the circumstances under which an adverse inference may be drawn where a witness is not called is grounded on common sense. The prosecution has discretion to assess the importance that the testimony of a witness would play, or would likely have played in relation to the issue concerned.

43. The unexplained failure by a party to give evidence or call a witness or tender certain documents may, in appropriate circumstances lead to an inference that the uncalled evidence would not have assisted the party's case. The failure to call a witness or tender documents can allow evidence that might have been contradicted by such witness or document to be more readily accepted. Further, where an inference is open from the facts proved, the absence of the witness or documents may be taken into account as a circumstance in favour of the drawing of the inference. But the absence of a witness or document cannot be used to make up any deficiency in the evidence. Thus it cannot be used to support an inference that is not otherwise sustained by the evidence. The rule cannot fill gaps in the evidence or convert conjecture and suspicion to inference.[33]

44. Whether the failure to call a witness or tender a document gives rise to an inference depends upon a number of circumstances. In Fabre v Arenales[34] Mahoney J. said that the significance to be attributed to the fact that a witness did not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call him feared to do so. There are circumstances in which it has been recognized that such an inference is not available or, if available, is of little significance. The foregoing position was cited with approval by Miler JA in Hewett v Medical Board of Western Australia[35] and also the same position is stated in Cross on Evidence.[36]

30 Criminal Appeal No. 11 of 2015-Visram A, Karanja W, and Mwilu P. JJJA.

31 {1972}E.A.549.

32 {1859} HCA 8; {1859}101 CLR 298, 308, 312.

33 See Schellenberg vs Hesse Tunnel Holdings Pty Ltd {P2000} HCA 18

34 {1992} 27 NSWLR 437, 449-450,Priestly and Sheller JJA agreeing)

35 {2004} WASCA 170

45. The rule only applies where a party is required to explain or contradict something. What a party is required to explain or contradict depends on the issues in the case as thrown in the pleadings or by the course of the evidence in the case. No inference can be drawn unless evidence is given of facts requiring an answer. This position was upheld in the following cases, namely; Schellenberg v Tunnel Holdings,[37] Ronchi v Portland Smelter Services Ltd[38] and Hesse Blind Roller Company Pty Ltd v Hamitovski.[39]

46. When no challenge is made to the evidence of witnesses who are called, as in this case, the principle in Jones v Dunkel cannot be applied to make an inference in respect of other witnesses who could have been called to give the same evidence.[40] A look at the record shows that the prosecution evidence is largely unchallenged. The witness who is said not to have been called was to corroborate testimony already presented. He was to produce the same medical report. The fact that it talks of the injury being a day old for an incidence that took place months before is not sufficient to trash the rest of the evidence. It has not been shown that the evidence on record has gaps which needed further clarification. As explained in Cross on Evidence,[41] the rule does not require a party to give merely cumulative evidence. In order for the principle to apply, the evidence of the missing witness must be such as would have elucidated a matter.[42]The appropriate inference to draw is a question of fact to be answered by reference to all the circumstances of the case. At the end of the day, common sense, probabilities and improbabilities prevail.

47. The P3 form was produced by a Doctor who properly laid a basis as the law demands. He explained that he was familiar with the handwriting of the doctor who prepared it. The doctor who prepared the P3 was said to be on study leave. The production on the P3 was as provided in the *Evidence Act*.[43] I find no merit in the argument that the prosecution failed to call key witnesses or to make an adverse inference.

Whether the appellant's defence was considered

48. The appellant argued that he raised a defence of albi that he was in Mombasa which was not rebutted, and, that, all that is required is for the defence to cast doubts on the prosecution case. He relied on Republic v Haron Ntoiti[44] and Republic v Godfrey Kiragu Mutegi & Another.[45]

49. The Respondent's counsel did not address this ground.

50. The defence must be weighed against the evidence offered by the prosecution. A trial court has a duty to weigh the evidence adduced in court by all the parties in totality and make a finding on the culpability

36 7th Edition, Page 1215, by Heydon J D.

37 Cubillo (No. 2) 355

38 [38] {2005} VSCA 83

39 {2006} VSCA 121 28

40 See Cross on Evidence, Supra.

41 Supra.

42 See Payne vs Parker , 202 Cubillo) No. 2) 360.

43 Cap 80, Laws of Kenya.

44 Meru Cr Case No. 75 of 2005

45 {2011} e KLR.

or otherwise of the accused. This is the basic calling of every court without exception.[46] The question that follows is whether the explanation given by the appellant was reasonable or whether it rebutted the evidence adduced by the prosecution. It is settled law that the defence of alibi raised by an accused person is to be proved on a balance of probability and that for it to be rejected it must be incredible and that the defence of alibi must be weighed against the evidence offered by the prosecution.[47]

51. The correct approach is to consider the alibi in light of the totality of the evidence in the case and the courts impression of the witnesses. It is acceptable in totality in evaluating the evidence to consider the inherent probabilities. The proper approach is to weigh up all the elements which point towards the guilt of the accused against all those which are indicative of his innocence, taking proper account of inherent strengths and weaknesses, probabilities and improbabilities on both sides and having done so, to decide whether the balance weigh so heavily in favour of the state as to exclude any reasonable doubt about the accused's guilt.[48]

52. In order to convict there must be no reasonable doubt that the evidence implicating the appellant is true. I have also re-analysed the entire evidence offered by the defence and weighed it against the prosecution evidence. The defence evidence did not rebut the prosecution evidence or cast reasonable doubts. The explanation offered by the appellant is in my view improbable and does not cast reasonable doubts on the prosecution case.

53. Lastly, the appellant in one of his grounds cited the existence of a grudge with the family members. His defence also sought to establish the alleged grudge. He alluded to a land dispute and described the charges as a frame up.

54. The Respondent's counsel argued that the question of the grudge came up after the appellant was placed on his defence, and, that, the issue was not raised at the time the prosecution witnesses gave evidence.

55. A distinction should be drawn between situations where an accused is proved by the totality of the evidence to have established ill motive. In such a case, the conviction cannot be allowed to stand. However, where the court finds the surrounding circumstances and probabilities excluded any reasonable possibility that someone other than the accused perpetrated the offence – the court will be right in rejecting allegations of ill motive. This is such a case. The evidence before the learned Magistrate viewed in totality pointed towards the appellant.

56. In my view, the appellant's submission on this issue amounts to nothing more than a suggestion of a possible motive as to why the state witnesses would falsely implicate the appellant in the commission of the offence. The suggestion is not grounded on evidence. This being so, the trial court was not entitled to draw an adverse inference against the prosecution evidence when there was no evidence to suggest ill motive.

57. The magistrate correctly placed reliance on the available evidence in rejecting the appellant's defence. Furthermore, in summing up her findings that led to conclusion that the state succeeded in proving its case beyond reasonable doubt, the Magistrate listed her reasons for so finding. In my mind, this shows the level of importance that the Magistrate attached to her findings. I find that the Learned Magistrate did not misdirect herself on this issue.

[46] John Matiko & Another vs Republic , Criminal Appeal No. 218 of 2012.

[47] See the Supreme Court of Nigeria in the case of Ozaki and another vs The State Case No. 130 of 1988.

[48] See the South African case of Ricky Ganda vs The State {2012} ZAFSHC 59, Free State High Court, Bloemfontein.

Conclusion

58. Upon re-evaluating the evidence, I am satisfied that the prosecution proved the offence to the required standard. It is my finding that the learned Magistrate correctly analysed the evidence and properly convicted the appellant. In the circumstances, I find no reason to fault the learned Magistrates findings.

59. Regarding the sentence, the evidence tendered established that the complainant was aged 17 years. Section 8 (4) of the Act provides that a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

60. The sentence imposed is the minimum sentence provided under the law, hence, this court has no discretion to interfere with it nor did the learned Magistrate have discretion to impose a lesser sentence. It follows that this appeal on both conviction and sentence fails and the same is hereby dismissed.

Right of appeal explained.

SIGNED, DELIVERED AND DATED AT NAIROBI THIS 13TH DAY OF JANUARY, 2020

JOHN M. MATIVO

JUDGE

SIGNED, DELIVERED AND DATED AT MALINDI THIS 23RD DAY OF JANUARY, 2020

REUBEN NYAKUNDI

JUDGE